United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 76-4068

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOHAWK EXCAVATING, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
and
W.J. USERY, JR., SECRETARY OF LABOR

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence supports the Commission's finding that Mohawk committed a nonserious violation of 29 CFR 1926.652(h), the Secretary's trenching-safety standard.

2. Whether the Act's enforcement provisions are constitutional.

COUNTERSTATEMENT OF THE CASE

This case is before the Court pursuant to section 11(a) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 et seq.) on Mowhawk's petition to

review an administrative law judge's decision which became the Commission's final order on February 11, 1976 (CD. 2) [1/] This Court has jurisdiction under 29 U.S.C. 660(a), the violations found having occurred in Enfield, Connecticut.

2. Facts found by the Commission

Mohawk is a Connecticut corporation engaged in the sewer construction business which does an annual business of approximately three million dollars and employs about 32 employees daily (JD 4; Tr. 1-221, 2-80). On June 24, 1974, nine Mohawk employees were working at a trench worksite in Enfield, Connecticut. Two of these employees were working at the bottom of the trench leveling crushed stone in preparation for the laying of a sewer pipe. (JD 1; Tr. 1-27, 44). The trench was 14 1/2 feet deep, 35 feet long, 8 feet wide at the top and 5 feet wide at the bottom. The trench was not sloped or shored. However, Mohawk had installed a trenchbox 16 feet long and 10 feet high to guard against the danger of collapse. (JD 6; Tr. 1-174; Exs. C-2, C-3, C-8). But the trenchbox-sides began about 3 1/2 feet above the bottom of the trench and ended about one foot below ground level (JD 7; Tr. 1-95). Furthermore, the

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1/ "CD" references are to the Commission's order. "JD" references are to the decision of the Commission's administrative law judge: "TR" references are to the transcript of hearing before the administrative law judge. "EX" references are to complainant's photographic exhibits. "A" references will be substituted when the printed appendix is filed pursuant to Fed. R. App. P. 30(c).

area of the trench outside the trenchbox was totally unsloped or shored; the trenchbox itself was not equipped with a ladder or steps; and the only method by which employees could enter and leave the trench was by scaling the horizontal cross or I-beams which partly formed the trenchbox sides. 2/ (JD 10; Tr. 1-158). These beams were between two and three feet apart and generally dirt and loose peebles covered the upper surface making hand and footholds precarious (JD 10; Tr. 1-124, 2-136, Exs. C-2, 3, 8). The first beam or "step" was between four and five feet above the bottom of the trench, making it necessary for employees leaving the trench to pull themselves up to it (JD 10; Tr. 1-95, 124, 159; 2-68, 136). Moreover, there was no last "step" as the sides of the box ended about one foot below ground level and employees were accordingly also forced to crawl from the top I-beam to ground level. (JD 8; Tr. 2-139).

OSHA Area Director Smith, upon inspecting the worksite and observing these conditions on June 24, 1974, informed the job foreman and/that a ladder was required. The foreman agreed, stated told Smith that Mohawk's customary practice was to use ladders under these conditions and immediately had one placed in the trench. (JD 11; Tr. 1-126, 161, 165).

3. Administrative Proceedings

As a result of the above inspection the Secretary on

2/ The trenchbox sides were essentially formed by criss-crossing vertical and horizontal I-beams. (See Ex. C-8)

June 24, 1974 cited Mohawk for a nonserious violation of 29 CFR 1926.652(h), the standard requiring that every trench be equipped with an adequate means of exit (citation),[3/] proposed a $75 penalty and ordered immediate abatement. The company, timely contested the alleged violation and the proposed penalty (notice of contest). The Secretary's formal complaint before the Commission and Mohawk's answer followed and the case was heard by the Commission's administrative law judge pursuant to 29 U.S.C. 661(i) on March 27, 1975. In these administrative proceedings, Mohawk contended that the horizontal I-beams which were part of the trenchbox were an adequate means of exit from the trench, and also contested the constitutionality of some of the Act's provisions. The judge's decision affirming the violation

3/ Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), provides that every employer affecting commerce "shall comply with occupational safety and health standards promulgated under this Act." 29 CFR 1926.652(h), the pertinent standard, requires with respect to the construction of trenches that:

> (h) When employees are required to be in trenches 4 feet deep or more, an adequate means of exit, such as a ladder or steps, shall be provided and located so as to require no more than 25 feet of lateral travel.

Sections 17(b) and (k) of the Act, 29 U.S.C. 666(b) and (j), define a serious violation as one which creates a "substantial probability that death or serious physical harm could result * * * unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Section 17(c), 29 U.S.C. 666(c), defines a nonserious violation as one which is "not* * *serious."

Mohawk was additionally cited for a nonserious violation of 1926.652(b) which was vacated by the judge and is not before this court.

and rejecting Mohawk's constitutional claims issued October 29, 1975 and was directed for review by one of the Commission members on November 14, 1975. That direction for review was vacated by the Commission on February 11, 1976 and the judge's decision became the final order of the Review Commission by operation of law. 29 U.S.C. 659(a); 661(j) (CD 2)

4. Decision below

The administrative law judge found that the above facts "conclusively" established that Mohawk was in nonserious violation of 1926.652(h) and that the $75 penalty proposed was appropriate. In so holding he determined that the means of exit provided by Mohawk---scaling the inside beam supports of the trench box -- was clearly "not adequate" to meet the requirements of the standard since (1) the I-beams were 2 to 3 feet apart; (2) the first was 4 to 5 feet above the bottom of the trench and employees had to pull themselves up to it; (3) the trenchbox ended 1 foot below the surface of the ground and employees had to hoist themselves up to ground level and (4) a considerable quantity of loose soil filled the space on top of the "I" beams, making hand and foot holds precarious (JD 10). He also noted that the "obvious solution to this situation was to weld or permanently affix a metal ladder having steps from 12 to 15 inches apart or hand and foot holds to the inside of the trenchbox," as Mohawk testified it had done with other trenchboxes. (JD 10; Tr. 2-215)

The judge also summarily rejected Mohawk's numerous constitutional objections by noting that they had all been made to several courts of appeals which had rejected them uniformly finding that the Act does not offend constitutional rights and guarantees. (JD 3-4).

Mohawk's petition for review by this Court followed when the judge's order became final.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S VIOLATION-FINDING

1. As detailed supra, on June 24, 1974, the Secretary cited Mohawk for a nonserious violation of section 5(a)(2) of the Act for failure to provide an adequate means of exit such as a ladder or steps to employees working within a 14 1/2 feet deep trench.4/ The judge affirmed this violation, and the record fully supports this result. Thus, the record shows that within this 35 foot long trench which was neither shored nor sloped there was no ladder or steps. The only means of exit for employees consisted of hauling themselves up the horizontal I beams which formed part of the 16 foot long trench box in the trench. But the OSHA area director who inspected

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4/ This Court has frequently examined the Act's remedial purposes, broad scope, and operation in enforcement contexts, which need not be reiterated here. E.g., Brennan v. OSHRC and Underhill Const'n. Corp., 513 F.2d 1032 (C.A. 2, 1975); REA Express v. Brennan and OSHRC, 495 F.2d 822 (C.A. 2, 1974); Brennan v. OSHRC and John J. Gordon Co., 492 F.2d 1027 (C.A. 2, 1974). See generally National Realty and Const'n. Co. v. OSHRC and Secretary, 489 F.2d 1257 (C.A.D.C., 1973); Brennan v. Butler Lime and Cement Co. and OSHRC, 520 F.2d 1011 (C.A. 7, 1975).

the Enfield worksite gave unrebutted testimony that the first cross-beam "step" was 4 to 5 feet above the bottom of the trench; that the following cross-beam "steps" were between 2 to 3 feet apart; and that the final "step" was non-existent because the trenchbox ended one foot below ground level and employees had to crawl up out of the trench. Moreover, all of the cross-beams were consistently covered with loose soil and pebbles making hand and foot-holds highly precarious (JD 10; Exs. C-3, C-8). On these facts, there can be no question of the correctness of the judge's decision. In the first place the standard expressly requires an "adequate means of exit" "whenever employees are required to be in trenches 4 feet deep or more..."Since in the instant case it is undiputed that the first "step" out of the trench was between 4 and 5 feet from its bottom, the means of exit was per se inadequate under this standard which by its terms requires some means of exit before the four foot level is reached.

Of course the same result follows even if the failure to have any means of exit within the first four feet is not itself dispositive. The obvious purpose of the standard is to assure quick exit. That purpose cannot possibly be fulfilled where, as here, employees have to hoist themselves

four to five feet to reach the first step toward that exit, are then faced with precarious hand and footholds because of the accumulation of soil on these steps and must finally stretch their way to safety because the "steps" do not even go to the top of the trench. Particularly in light of the fact that the standard specifies two methods of compliance--steps or ladders--, that the Secretary has elsewhere mandated that steps be no more than "12" inches apart, 5/ that the Company's foreman not only agreed with the Secretary's inspector that a ladder was required but had one at the worksite which was immediately placed in the trench, and that Mohawk had installed metal ladders in other trenchboxes on the jobs (JD 10; Tr. 2-215) the judge's conclusion that Mohawk committed a non-serious safety violation by permitting its employees to work in a trench without an adequate means of exit is plainly supported and should be affirmed. NLRB v. United Ins. Co., 390 U.S. 254, 260 (1968); NLRB v. Orleans Mfg. Co., 412 F.2d 94, 94-96 (C.A. 2, 1969); Olin Construction Co. v. OSHRC and Brennan, 525 F.2d 464, 465-466 (C.A. 2, 1975). See Coughlan Construction Co., Docket Nos. 5303, 5304, 3 CCH ESHG, Para. 20, 106 (1975).

5/ 29 CFR 1910.26(a)(iii) (portable metal ladders); 29 CFR 1910.27(b)(ii) (fixed ladders).

2. Mohawk does not dispute the judge's findings on the means of exit which it provided for employees working in the trench, as indeed it cannot in view of the area director's testimony and the photographic evidence in the record (JD 10; Exs. C-2, 3, 8). Rather, the Company contends that in the opinion of its employees and engineers the cross-beams provided an "adequate" means of exit and therefore it was in compliance with the standard (Br. 18). The short answer is of course that such testimony was plainly irrelevant in this case on two grounds. In the first place, the test under this standard, as the Commission has expressly held, Callahan Bros. Inc. Docket No. 3278, 1973-1974 CCH OSHD Para 17,151 (1974), was whether there was an objective failure to have an adequate means of exit, this test was manifestly applied by the judge here (See J.D. 10), and as noted his result was not only reasonable but required, See, Brennan v. OSHRC and Santa Fe Trail Transport Co., 505 F.2d 869, 872-873 (C.A. 10, 1974); Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233-234 (C.A. 5, 1974). In the second place, it is well settled that private determinations as to safety are inadequate defenses to violations where, as here, the regulation unambiguously forecloses such discretion. Messina Const'n. Corp. v. OSHRC and Secretary, 505 F.2d 701, 702 (C.A. 1, 1974). Accord: Intercounty Const'n. Co. v. OSHRC, 522 F.2d 777, 780 (C.A. 4, 1975) cert den. 44 U.S.L.W.

3412 (Jan. 19, 1976). Compare Lee Way Motor Freight v. Secretary, 511 F.2d 864, 866, 870 (C.A. 10, 1975); Ryder Truck Lines v. Brennan, 497 F.2d 230, 233 (C.A. 5, 1974. Thus, as noted supra, the regulation requires some means of exit below the four foot level and here there was none--let alone an adequate means of exit. The contention should accordingly be rejected. 6/

3. Mohawk implicitly asserts throughout its brief that even if the Court upholds the administrative law judge's substantial-evidence determination, the citation should be vacated because it is a minor infraction, presents no threat of serious harm and is "asinine" (Br. 2). The short answer to this is that the Occupational Safety and Health Act is specifically designed to encompass nonserious violations as well as serious, repeated and willful violations. 29 U.S.C. 666(c). As the Fifth Circuit noted in the case of Ryder Truck Lines, Inc. v. Brennan, supra, 497 F.2d at 233.

6/ The above discussion makes irrelevant Mohawk's attempts to frame this issue as an improper credibility finding by the judge. We do note however that contrary to Mohawk's contentions, the judge did not rely on the opinion of the Secretary's Area Director, but only on his testimony insofar as it detailed objective conditions at the worksite which he observed. In any event, even if this were a credibility finding, the judge properly credited the area director over Mohawk's witnesses, especially in light of corroborating photographic evidence, and this credibility finding should not be overturned. Olin Construction Co. v. OSHRC and Brennan, supra, 525 F.2d at 467 (C.A. 2, 1975); N.L.R.B. v. Dixie Gas Inc., 323 F.2d 433 (C.A. 5, 1963).

> The legislative history of the statute reveals that its declared purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651(b)...Moreover, the Act specifically encompasses non-serious violations, i.e. violations which do not create a substantial probability of serious physical harm. 29 U.S.C. 666(g)(j). Avoidance of minor injuries, as well as of major ones, was intended to be within the purview of this liberal Act.

Accord: Lee Way Motor Freight v. Secretary, supra 511 F.2d at 867, 869-70; California Stevedore and Ballast Co. v. OSHRC and Secretary, 517 F.2d 986,988 (C.A. 9, 1975).

The contention should accordingly be rejected.

II. MOHAWK'S CONSTITUTIONAL CONTENTION'S ARE WITHOUT MERIT

1. Mohawk contends (1) the Act's civil penalties are effectively criminal and therefore imposed in violation of the Sixth Amendment, (br. 12-16) and (2) the Act violated its due process hearing rights by permitting the Secretary to assess monetary penalties without giving a chance to be heard and creating an oppressively laborious procedure for defending one's property. (br. 16-18) Both arguments have been made to numerous other courts of appeals and unanimously rejected. Beall Construction Co. v. OSHRC and Brennan, 507 F.2d 1041, 1044-45 (C.A. 8, 1974); Atlas Roofing Co. v. OSHRC, 518 F.2d at 1000-1013 (C.A. 5, 1975) cert denied as to that issue, March 22, 1976, No. 75-746; Lake Butler Apparel Co. v. Secretary, 519 F.2d

84, 86-88 (C.A. 5, 1975); Frank Irey, Jr., Inc., v. Brennan and OSHRC, supra, 519 F.2d at 1204-1207 (C.A. 3, 1975); cert denied as to those issues March 22, 1976, No. 75-746; Brennan v. Winters Battery Mfg. Co., supra 531 F.2d at 324-325, (C.A. 6, 1975); cert denied 44 L.W. 3640; Clarkson Const'n Co. v. OSHRC and Secretary, supra 531 F.2d at 455,456 (C.A. 10, 1976). These results are clearly proper since it is well settled with respect to the 6th Amendment that whether a monetary sanction is civil or criminal is a question of statutory construction; that where Congressional intent to create civil sanctions is clear such intent is controlling 7/ and that the deterrent nature of such sanctions does not make them "criminal" where one of their aims is the encouragement of socially beneficial conduct, and in fact may be essential to it. 29 U.S.C. 651, National Independent Coal Operator's Association et al. v. Kleppe, U.S. , 96 S. Ct. 809 (1976). 8/

7/ 29 U.S.C. 666; Legislative History of the Occupational Safety and Health Act of 1970, 92nd Cong. 1st Sess. (June 1971) (Committee Print) 425,300,156,175-176, 856-857,871-872,1194,1149,1203,1210.

8/ Accord: One Lot Emerald Cut Stones v. U.S., 409 U.S. 232,235-237 (1972); Kennedy v. Mendoza-Martinez, 372 U.S. 144,169,180-183 (1963); Helvering v. Mitchell, 303 U.S. 391,398-401 (1938); Oceanic Navigation Co. v. Stranahan, 214 U.S. 320,336-338,(1903); U.S. v. J.B. Williams Co., 498 F.2d 414,421 (C.A. 2, 1974); Amato v. Porter, 157 F.2d 719,721-722 (C.A. 10, 1946), approved in Shapiro v. U.S., 335 U.S. 1,35 at n. 45 (1948).

With respect to the due process objections raised by Mohawk, (br. 16-18) the same courts, see cases supra at 11-12 and Dan J. Sheehan Co. v. OSHRC and Secretary, 520 F.2d 1036,1042 (C.A. 5, 1975), denied cert. 44 L.W. 3531, have uniformly held that the Act's citation procedure "does not offend against due process" because it gives cited employers "timely notice * * * and an opportunity to be heard." See National Independent Coal Operator's Association et al v. Kleppe, supra, 96 Sup. Ct. at 816 This result is plainly correct, since the Act merely authorizes the Secretary to propose penalties and to issue a citation containing proposed abatement requirements. 29 U.S.C. 658(a),659(a). If the employer routinely contests the citation and proposed

8/ (cont.) Mohawk argues that penalties assessed by the Secretary are penal under the multiple test espoused by the Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Without responding in detail here to Mohawk's point by point anyalysis, we simply note that this is exactly the argument made and rejected in every case which has attacked the Act on 6th amendment grounds see cases supra, especially Atlas Roofing Co. v. OSHRC, 518 F.2d at 994-1011 and Frank Irey, Jr., v. Brennan and OSHRC, 519 F.2d at 1204-1207.

Moreover, Mohawk's reliance (Br. 15) on Camara v. Municipal Court and See v. Seattle, 387 U.S. 523,541 (1967), is irrelevant to the Sixth Amendment issue. Those cases merely hold that one cannot be charged with a crime for insisting upon a warrant before inspection of private premises. The Act contains no provision remotely authorizing criminal prosecution for refusals to permit warrantless searches; no such prosecution has been suggested, much less attempted; and there has been no contention the inspection was improper here.

penalty, the Secretary must establish the alleged violation and the propriety of his abatement requirement and proposed penalty by a preponderance of the evidence in a hearing before the impartial Review Commission, which is empowered to modify the citation and proposed penalty or vacate them if the Secretary does not prove his case. 29 U.S.C. 659,661(i),666(i). Only where the employer fails to contest do the citation and proposed penalty become "final and unreviewable." But this is only to say that the employer may waive his procedureal rights by not timely taking statutorily-prescribed steps--a waiver which the Supreme Court has consistently held proper even where the prescribed steps were much more burdensome than those here. E.g., Lichter v. U.S., 334 U.S. 742,789-793 (1948); Yakus v. U.S., 321 U.S. 414,433-434,444 (1944). 9/ Where, as here, the employer

9/ Accord: Consol. Edison Co. v. N.L.R.B., 305 U.S. 197,226-228 (1938); Milheim v. Improvement District, 262 U.S. 710,724 (1923); Farncomb v. Denver, 252 U.S. 7,11 (1920). "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *** Courts may for that reason refuse to consider a constitutional objection even though a like objection has previously been sustained in a case in which it was taken." Yakus, supra, at 444.

Moreover, even if the employer fails to contest and the citation and proposed penalty become final and unreviewable, he may still obtain an extension of the citation's abatement requirement if he shows, upon notice and hearing, that he attempted in good faith to comply with that requirement but was unable to do so "because of factors beyond his reasonable control." 29 U.S.C. 659(c); see 29 CFR 2200.34; Leg. Hist. 155.

contests, he is plainly entitled to a hearing and decision on record evidence before any consequence can be inflicted. And in either case the cited employer has been afforded an opportunity for hearing before any obligations become effective, let alone before he is required to fulfil those obligations. That is more than due process requires. Bell v. Burson, 402 U.S. 535 (1971) Fuentes v. Shevin, 407 U.S. 67,80-84 (1972); Goldberg v. Kelly, 397 U.S. 254,264,266-271 (1970); Snidach v. Family Finance Corp., 395 U.S. 337,342 (1968); Coe v. Armor Fetilizer Works, 237 U.S. 413 (1914); Palmer v. McMaho, 133, U.S. 660(1890).

2. The company contends at length (Br. 8-12) that OSHA civil enforcement proceedings violate the Seventh Amendment right to jury trial "In suits at common law, where the value in controversy shall exceed twenty dollars." This contention has been rejected by every appellate court that has considered the issue. Beall Const'n. Co. v. OSHRC and Brennan, 507 F.2d 1041, 1044 (C.A. 8, 1974); Atlas Roofing Co. v. OSHRC, 518 F.2d 990, 1011-12 (C.A. 5, 1975) cert. granted on that issue, (No. 75-746) March 22, 1976; Lake Butler Apparel Co. v. Secretary, 519 F.2d 84, 88-89 (C.A. 5, 1975); Frank Irey, Jr., Inc. v. Brennan and OSHRC, supra, 519 F.2d at 1205-06 and n. 11, 1215-19 (C.A. 3, 1975) cert. granted on that issue March 22, 1976, No. 75-748); Brennan v. Winters Battery Mfg. Co., 531 F.2d 317, 325 (C.A. 6, 1975) cert. denied/ 44 L.W. 3640 Clarkson Const'n. Co. v. OSHRC and Secretary, supra, 531 F.2d 451, 455-6 (C.A. 10, 1976). And these results are clearly correct. Thus, it is clear that Review Commission proceedings are not "at common law" and the Seventh Amendment does not apply. In Curtis v. Loether, 415 U.S. 189 (1974), the Supreme Court was required to decide whether the Seventh Amendment was inapplicable to all "new causes of action created by congressional enactment." The Court drew a clear distinction between statutory actions for which jury trial may be mandated and those outside the Seventh Amendment, unanimously holding (415 U.S. at 194 and n. 8):

> that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the . . . [agency's] role.
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> * * *
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> [T]he concept of expertise on which the administrative agency rests is not consistent with the use of a jury as a fact finder." Jaffe, Judicial Control of Administrative Action 90 (1965).

Citing NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937), Katchen v. Landy, 382 U.S. 323 (1966), and Guthrie National Bank v. Guthrie, 173 U.S. 528 (1899), the Court went on to note that (Id., at 195):

> [t]hese cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment.

Accord: Pernell v. Southall Realty, 416 U.S. 363, 383 (1974).

These holdings dispose of Mohawk's Seventh Amendment contention, since Review Commission proceedings plainly fall within them. First, Congress' decision to entrust OSHA enforcement to an administrative tribunal rather than the district courts accords with settled precedent that civil proceedings involving "public rights" may be adjudicated by agencies. E.g., Murray's Lessee v. Hoboken Land Co., 59 U.S. (18 How.) 272, 284 (1855); NLRB v. Jones and Laughlin Steel Corp., supra; McLean Trucking Co. v. OSHRC and Brennan, supra, 503 F.2d at 11. See Jaffe, Judicial Control of Administrative

Action 91 (1965). Second, judicial effectuation of the OSHA-created public right of every worker to safe and healthful working conditions "so far as possible" inherently involves specialized factual, technical and statutory matters which can be resolved in the most uniform and efficient manner by a centralized expert body -- crucial considerations where Congress believed uniform nationwide application of safety and health standards essential to accomplish the statute's goals. E.g., Brennan v. OSHRC and John J. Gordon Co., 492 F.2d 1027, 1030 (C.A. 2, 1974); Nat'l. Realty and Const'n. Co. v. OSHRC and Secretary, supra, 489 F.2d at 1260-1261 and n. 10.[10/] Finally, Congress clearly meant enforcement proceedings to be expeditious, since it mandated swift finality at each stage of citation contests and suspended contesting employers' abatement duties to the detriment of employees pending adjudication --- a compromise which is incompatible with the delays inherent in securing jury trial in the Federal district courts. Supra, pp. 10-12 and n. 7. As Senator Javits stated in support of his successful floor amendment creating the Commission and its expedited enforcement procedures, these provisions protect employees by affording "the certainty and celerity which would come from this kind of enforcement, because there is speedier action here." Leg. Hist. 463, 470.

10/ See, e.g., Leg. Hist. 141-145, 844-846, 853-854, 991.

It seems obvious that "jury trials would 'dismember' the statutory scheme"[11/] of OSHA by inhibiting the development of safety and health expertise; dispersing enforcement determinations into hundreds of district courts; creating manifold opportunities for delay and forum shopping; and injecting prohibitive costs into a streamlined procedure designed to afford cheap and easy adjudication to employers and employees alike.[12/] The Curtis rule must accordingly apply to OSHA, as the Courts have repeatedly noted. See, e.g., Beall Const'n. Co., supra. See also U. S. v. J. B. Williams Co., supra, 498 F.2d at 430 n. 18.

Moreover, even if Curtis and Pernell were not dispositive the Seventh Amendment is inapplicable because Review Commission proceedings are not "at common law" under traditional law/equity distinctions. In Mitchell v. DeMario Jewelry Co., 361 U. S. 288, 291 (1960), approved in Curtis, supra, the Supreme Court affirmed the Secretary's power to recover workers' wages while enjoining prospective violations of the Fair Labor Standards Act, holding that "since the public

11/ 415 U. S. at 195.

12/ To cite just one example, employers may presently contest citations pro se and represent themselves or be represented by their safety directors before the Commission and its judges. 29 CFR 2200.22(a) and (d) (1974). This salutary practice will effectively be denied employers if jury trial and attendant legal proceedings are required under OSHA, and may itself constitute a substantial deterrent to employer contests.

interest is involved in a proceeding of this nature" and "the court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake," no jury trial with respect to the monetary claim was required. And in Wirtz v. Jones, 340 F.2d 901, 904 (1965) the Fifth Circuit unanimously rejected contentions that combining equitable relief with traditional legal issues requires a jury trial for the latter, noting that the purpose of FLSA injunctions is "to correct a continuing offense against the public interest of" and that even if "as a result, money may pass from the employer into the pocket of the employee or * * * into the * * * United States Treasury * * * [it] is simply a part of a reasonable and effective means which Congress * * * found * * * necessary * * * to bring about general compliance with [the Act]." It accordingly held that no jury trial was required for the back-wages part of this injunctive action because recovery of back wages was meant to be applied uniformly to afford "protection to employers who pay a decent wage and must compete with employers who pay a substandard wage." Id., at 905. Accord: Clifton B. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 663 (C.A. 4, 1969).

It seems too clear to require argument that OSHA's enforcement scheme not only requires analogous uniformity in application, e.g., Brennan v. OSHRC and John T. Gordon Co., 492 F.2d 1027, (C.A. 2, 1974) but that OSHA enforcement proceedings are a

fortiori outside the Seventh Amendment because their principal purpose is equitable --- the securing of abatement orders neutralizing hazards in order to protect employees. This is particularly clear where a citation for nonserious violation is not accompanied by any penalty, cf. 29 U.S.C. 658(a) and 659(a) with 666(c) --- a situation in which the prompt abatement prescribed by the citation is the sole relief contemplated. But it is equally true where, as here, the abatement requirement is accompanied by civil penalties designed to assure general future compliance, since in either case a binding abatement order remains enforcement's central aim. Thus, sections 9 and 10(a) mandate abatement as part of the language creating the citation process but relegate accompanying penalties, "if any," to an ancillary role. 29 U.S.C. 658(a), 659(a). Sections 10(b) and (c) authorize severe sanctions for failure "to correct a [cited] violation" within the prescribed abatement period, and create a special proceeding by which employers can alter such periods without contesting the violation or penalty themselves. 29 U.S.C. 659(b) and (c). 29 U.S.C. 662 treats Commission enforcement as analogous to proceedings seeking a permanent injunction, to which immediate temporary injunctive relief through the district courts is a necessary complement. And the legislative history overwhelmingly documents Congress' belief that the Act's administrative enforcement was equitable

in nature, designed to secure swift and effective abatement orders protecting employees.[13/]

The Seventh Amendment is accordingly inapplicable to Commission proceedings because they are principally equitable, though penalty assessment remains an integral part of the Act's preventive scheme.[14/]

13/ E.g., Leg. Hist. 149-155, 172-175, 194-196, 297-298, 462-463 851-856, 1191-92. As Senator Javits explained the enforcement proceedings created by his successful floor amendment,

> It creates a review commission which will deal with all complaints referred to it by the Secretary and which will have the same type of authority that the Federal Trade Commission exercises: the power to issue a cease and desist order which, if challenged within a given period of time, can be reviewed by the Circuit Court of Appeals. Its operation is stayed if the Circuit Court so orders. If the Secretary desires to enforce the order through the contempt power * * * he can go into court * * *. It is the traditional Federal Trade Commission type of procedures.

Leg. Hist. 462 (emphases added).

14/ We additionally note with respect to both Sixth and Seventh Amendment contentions that an authoritative survey conducted on behalf of the Administrative Conference of the United States has concluded on the basis of empirical evidence and the entire literature in this area that pure administrative imposition of monetary penalties has been utilized since the nineteenth century and consistently upheld by the courts; that its use throughout the Federal establishment is dramatically increasing; that such use is justified by numerous policy and regulatory considerations; that penalty imposition through the courts severely distorts the chance for fair regulation; and that administratively-imposed penalties are "beyond serious [constitutional] challenge if they

> (1) are rationally related to a regulatory * * * scheme;

(footnote 14/ continued next page)

(footnote 14/ continued)

> (2) do not deal with offenses which are malum in se * * *; and
> (3) may be expected to have a prophylactic or remedial effect.

Goldschmid, An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies, 2 Recommendations and Reports of the Administrative Conference of the United States.

The survey goes on to note that pure administrative imposition is "most desirable" when the following factors are present:

> (a) a large volume of cases likely to be processed annually;
> * * *
> (c) the importance to the enforcement scheme of speedy adjudications;
> (d) the need for specialized knowledge and agency expertise in the resolution of contested issues;
> * * *
> (f) the importance of greater consistency of outcome (particularly as to the penalties imposed) which could result from agency, as opposed to district court, adjudications; and
> (g) the likelihood that an agency (or group of agencies in combination) will establish an impartial forum in which cases can be efficiently and fairly decided.

Id., at 932-933. In addition to the fact that these elements are indisputably present under OSHA, the survey repeatedly cites OSHA as a model system in which pure administrative imposition is desirable and has been ideally effectuated. Id., at 940, 942, 947 passim. The survey's recommendation for increased administrative imposition of monetary penalties under the above criteria has been formally recommended to Congress and the courts by the Administrative Conference, a statutory body created by the Administrative Procedure Act to make "recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities * * * may be carried out expeditiously in the public interest." 5 U.S.C. 571 et seq..

CONCLUSION

For the above reasons the petition should be denied and the Commission's order affirmed and enforced in full. 29 U.S.C. 660(a).

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July 1976 copies of the above brief were served by appropriate air or surface mail, postage prepaid, upon:

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